

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LANCE P. McDERMOTT,

Plaintiff,

v.

JOHN P. POTTER, Postmaster General
United States Postal Service, et. al.,

Defendant.

NO. C09-776-RSL

**DEFENDANTS'
MOTION TO DISMISS
PURSUANT TO RULE 12(b)(1)
AND RULE 12(b)(6)**

(Noted for Consideration on
August 28, 2009, Pursuant to
Local Rule 7(d)(3)).

I. INTRODUCTION

Plaintiff is an employee of the United States Postal Service. This is the fifth action he has filed in this Court attempting to challenge various Postal Service policies and practices.¹ Here, Plaintiff attempts to challenge the alleged closure of the SeaTac Air Mail Center and alleged outsourcing of Postal jobs. He seeks to compel the production of an approved Area Mail Processing Plan, which he alleges directed the closure of the Air Mail Center. He further alleges that the Postal Service officials made false statements, acted with reckless disregard for the truth, and made false representations regarding the Area Mail Processing Plan, and seeks to bring a claim of misrepresentation. Finally, he

¹ See McDermott v. US Postal Service, CV05-00860-RSL; McDermott v. US Postal Service, CV06-1335-MJP; McDermott v. US Postal Service, CV07-1174-JLR/United States Postal Service Privacy Act Litigation, 08-md-1937-JLR; McDermott v. John Potter, CV08-1846-JCC

1 seeks to challenge the Postal Service's alleged outsourcing of jobs in connection with the
2 alleged closure of the Air Mail Center.

3 This Court lacks jurisdiction to review Plaintiff's claim to compel the production
4 of documents under the Freedom of Information Act ("FOIA"), because he failed to
5 exhaust his administrative remedies by filing a proper request for documents with the
6 Postal Service. The Court also lacks jurisdiction to compel the disclosure of documents
7 under the Administrative Procedures Act ("APA"), because Congress specifically
8 exempted the Postal Service from the judicial review provisions of the APA.

9 Furthermore, the Court lacks jurisdiction to review Plaintiff's misrepresentation claim
10 because he failed to comply with the administrative claim requirements of the Federal
11 Tort Claims Act ("FTCA"), and the misrepresentation exception to the FTCA would bar
12 Plaintiff's claim even if he had exhausted his administrative remedies.

13 Plaintiff lacks standing to challenge Postal Service decisions regarding the alleged
14 closure of the Air Mail Center or the outsourcing of Postal jobs, because he has failed to
15 allege an injury in fact. Even if he could establish standing, Plaintiff has failed to identify
16 a substantive legal framework of federal law that would allow him to bring these claims
17 in this Court. Furthermore, even if there were a substantive legal framework, the Postal
18 Reorganization Act ("PRA") preempts challenges to Postal Service regulations and
19 administrative decisions and employment-related claims, from being brought in Federal
20 District Court. Thus, Plaintiff's claims must be dismissed for lack of jurisdiction, and in
21 the alternative, failure to state a claim.

22 II. STANDARD OF REVIEW

23 I. Subject Matter Jurisdiction

24 A complaint must be dismissed under Fed.R.Civ.P. 12(b)(1) if, considering the
25 factual allegations in the light most favorable to the plaintiff, the action: (1) does not arise
26 under the Constitution, laws, or treaties of the United States, or does not fall within one of
27 the other enumerated categories of Article III, Section 2 of the Constitution; (2) is not a
28 case or controversy within the meaning of the Constitution; or (3) is not one described by

any jurisdictional statute. Baker v. Carr, 369 U.S. 186, 198 (1962); D.G. Rung Indus., Inc. v. Tinnerman, 626 F.Supp. 1062, 1063 (W.D.Wash. 1986); see 28 U.S.C. §§ 1331(federal question jurisdiction) and 1346 (United States as defendant). When considering a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1), the court is not restricted to the face of the pleadings, but may review any evidence to resolve factual disputes concerning the existence of jurisdiction. McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988), Biotics Research Corp. v. Heckler, 710 F.2d 1375, 1379 (9th Cir. 1983). A federal court is presumed to lack subject matter jurisdiction until plaintiff establishes otherwise. Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989). Therefore, the plaintiff bears the ultimate burden of proving the existence of subject matter jurisdiction. Stock West, 873 F.2d at 1225; Thornhill Publ'g Co., Inc. v. Gen. Tel. & elec. Corp., 594 F.2d 730, 733 (9th Cir. 1979). Once a defendant challenges the facts underlying the jurisdictional allegations in a complaint based on evidence outside the pleadings, the plaintiff bears the burden of establishing, by affidavits or other evidence, that subject matter jurisdiction does in fact exist. St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989).

II. Failure to State a Claim

A complaint should be dismissed for failure to state a claim upon which relief can be granted if it appears beyond a doubt that the plaintiff can prove no set of facts in support of the claim that would entitle him to relief. Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1990). All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. Associated Gen. Contractors v. Metro. Water Dist., 159 F.3d 1178, 1181 (9th Cir. 1998). Conclusory allegations of law and unwarranted inferences, however, are insufficient to defeat a motion to dismiss. Id. A court can dismiss an action under 12(b)(6) where the plaintiff fails to allege either a cognizable legal theory or sufficient facts in support of a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990). While a complaint need not contain detailed factual allegations, a plaintiff's

obligation to provide the grounds entitling him to relief requires more than mere labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56, 127 S. Ct. 1955, 1964-65 (2007) (citations omitted). The complaint must plead “enough facts to state a claim to relief that is plausible on its face.” Id.

III. ARGUMENT

I. The Court Lacks Jurisdiction Over Plaintiff’s FOIA Claim.

Plaintiff seeks to compel the production of an approved Area Mail Processing Plan under the FOIA (Dkt. #1, pg. 3). He claims that he attended a “Labor/Management meeting” on March 27, 2009, in order to get a copy of “the approved Area Mail Processing Plan” (Dkt. #1, pg. 21). He states that he asked to see a copy of the plan, that allegedly directed the closure of the SeaTac Air Mail Center, at the beginning and end of the meeting, but never received a copy (Dkt. #1, pg. 22). Plaintiff alleges that has exhausted all administrative procedures get the information (Dkt. #1, pg. 3), but he has failed to show that he complied with any of the administrative requirements to formally request the production of Postal Service documents pursuant to the FOIA.

A plaintiff seeking information under the FOIA has a duty to exhaust his administrative remedies before invoking federal court review. See United States v. Steele, 799 F.2d 461, 465-66 (9th Cir. 1986). Where a plaintiff has failed to exhaust within the administrative system, the district court will dismiss the case for lack of jurisdiction. Id. To satisfy this exhaustion requirement, a plaintiff “must request specific information in accordance with published administrative procedures, see 5 U.S.C. § 552(a)(1), (2) & (3), and have the request improperly refused....” Id. at 466.

The published administrative procedures for the Postal Service require a request for information under the FOIA to be submitted in writing to the custodian of the official record, if known, or to the Manager, Records Office, U.S. Postal Service, 475 L’Enfant Plaza SW, Washington, DC 20260, telephone (202) 268-2608. 39 C.F.R. § 266.6(a)(1).

1 Requests submitted to the Office of Inspector General should be submitted to the
 2 Freedom of Information Act/Privacy Officer, Office of Inspector General, 1735 North
 3 Lynn Street, Arlington, Virginia, 22209-2020. Id. Inquiries should be clearly marked,
 4 “Privacy Act Request.” Id.

5 Plaintiff has failed to show that he filed a proper request for information with the
 6 Postal Service under the FOIA. Plaintiff’s request for documents from a presenter at a
 7 meeting does not satisfy the jurisdictional requirements of administrative exhaustion (Dkt.
 8 #1, pg. 21-22). Thus, this Court lacks jurisdiction over any claim to compel the
 9 production of documents under the FOIA.

10 **II. The Court Lacks Jurisdiction Over Plaintiff’s APA Claim.**

11 Plaintiff also asks the Court to compel the production of the approved Area Mail
 12 Processing Plan under the APA, 5 U.S.C. § 702 (Dkt. #1, pg. 39). But Plaintiff cannot
 13 bring APA claims against the Postal Service, because Congress specifically exempted the
 14 Postal Service from the judicial review provisions of the APA.

15 The APA allows Congress to override its judicial review provisions. Its judicial
 16 review provisions apply “except to the extent that statutes preclude judicial review.”
 17 5 U.S.C. § 701(a). The PRA is a statute that precludes judicial review of Postal Service
 18 activities. The PRA states that “no Federal law dealing with public or Federal contracts,
 19 property, works, officers, employees, budgets, or funds, including the provisions of
 20 chapters 5 and 7 of title 5 [i.e. the APA administrative procedures and judicial review
 21 provisions], shall apply to the exercise of the powers of the Postal Service.” 39 U.S.C.
 22 § 410(a).

23 This Court has specifically held that, “[e]ven though the APA, 5 U.S.C. § 706,
 24 generally subjects agency actions to judicial review, the PRA specifically exempts the
 25 Postal Service from such review.” Currier v. Henderson, 190 F.Supp.2d 1221, 1228
 26 (W.D.Wash. Jan. 30, 2002) (aff’d by Currier v. Potter, 379 F.3d 716 (9th Cir. 2004)).
 27 The Ninth Circuit affirmed the Court’s decision stating “...the PRA provides that various
 28 forms of federal law, including the APA, that normally apply to government entities do

not apply to the [Postal] Service.” Currier, 379 F.3d at 725 (*citing* 39 U.S.C. § 410(a)). The Ninth Circuit further held that the Postal Service is exempt from the APA’s general mandate of judicial review of agency actions. Id.

This Court reiterated this finding in a prior action brought by Plaintiff. In McDermott v. U.S. Postal Serv., the Court stated, “[i]ndeed, Congress specifically exempted the Postal Service from Chapters 5 and 7 of the Administrative Procedure Act, which would otherwise subject Postal Service actions to judicial review.” McDermott v. U.S. Postal Serv., 2006 WL 2473493 *3 (W.D. Wash. Aug. 28, 2006) (*citing* 39 U.S.C. § 410(a) and Pitney Bowes, Inc. v. U.S. Postal Serv., 27 F.Supp.2d 15, 20-21 (D.D.C. 1998)). Thus, Plaintiff’s claims against the Postal Service cannot be brought under the APA.

III. The Court Lacks Jurisdiction Over Plaintiff’s Misrepresentation Claim.

Plaintiff alleges that “[t]he form of this ligation [sic] is *Misrepresentation* by United States Postal Service (USPS) Officials concerning the concealment of facts, failure to disclose the facts, telling half truths, and the issuance of false statements concerning the Area Mail Processing Plan. . . .” (Dkt. #1, pg. 1). He alleges that Postal Service officials acted with “complete reckless disregard for the truth” and made false representations. Id. Although Plaintiff does not cite the FTCA in his complaint, tort claims brought against the Postal Service are governed by the provisions of the FTCA. 39 USC § 409(c). And Plaintiff has failed to comply with the administrative requirements to pursue a tort claim under the FTCA.

The Postal Service enjoys sovereign immunity absent a specific waiver. See U.S. Postal Serv., v. Flamingo Indus., 540 U.S. 736, 744 (2004). In general, the FTCA waives the Postal Service’s immunity when its employees act negligently within the scope of their official duties. See 39 U.S.C. § 409(c); 28 U.S.C. § 1346(b)(1). But a court lacks subject matter jurisdiction to hear a claim against the Postal Service under the FTCA if the plaintiff has not exhausted his administrative remedies. See 28 U.S.C. § 2875(a); see

1 also Brady v. United States, 211 F.3d 499, 502 (9th Cir. 2000). The administrative claim
 2 requirement mandates that a plaintiff present a claim to the appropriate federal agency
 3 within two years of the date it accrues. Staple v. United States, 740 F.2d 766, 768 (9th
 4 Cir. 1984); see also Suarez v. United States, 22 F.3d 1064, 1065 (11th Cir. 1994). The
 5 administrative claim requirement is jurisdictional and must be strictly adhered to because
 6 the FTCA waives sovereign immunity and any such waiver must be strictly construed in
 7 favor of the United States. See Brady, 211 F.3d at 501 (*citing Jerves v. United States*,
 8 966 F.2d 517, 521 (9th Cir. 1992)). When no administrative claim has been filed with the
 9 appropriate administrative agency, a district court is without jurisdiction to hear the case,
 10 and dismissal for lack of subject matter jurisdiction is mandated. Suarez, 22 F.3d at 1065.

11 Here, Plaintiff has failed to show that he filed an administrative claim for
 12 misrepresentation with the Postal Service, and properly exhausted his administrative
 13 remedies with respect to any tort claim he may have against the Postal Service. Thus, this
 14 Court lacks jurisdiction to hear a claim for misrepresentation.

15 Even if Plaintiff had exhausted his administrative remedies, the misrepresentation
 16 exception to the FTCA bars suits based on negligent as well as deliberate
 17 misrepresentations, United States v. Neustadt, 366 U.S. 696, 81 S.Ct. 1294, 6 L.Ed.2d
 18 614 passim (1961), whether based on “false statements or a failure to provide information
 19 which [the government] had a duty to provide,” Green v. United States, 629 F.2d 581,
 20 584-85 (9th Cir. 1980). Thus, even if Plaintiff could establish that he exhausted his
 21 administrative remedies, his misrepresentation claim would still be barred.

22 **IV. The Court Lacks Jurisdiction Over Plaintiff’s Challenge to Postal**
 23 **Service Decisions Regarding the Closing of Facilities.**

24 Plaintiff seeks to challenge the Postal Service’s decisions regarding the alleged
 25 closure of the Air Mail Center in SeaTac, Washington. He argues that the Postal Service
 26 did not give proper notice, hold a public meeting, perform a feasibility study, or have an
 27 approved Area Mail Processing Plan (Dkt. #1, pg. 23).
 28

1 **A. Standing**

2 Plaintiff lacks standing to challenge the Postal Service's decision regarding the
3 alleged closing of the Air Mail Center, because he has failed to allege an injury in fact.
4 The only injury Plaintiff alleges with respect to this claim is that "concealing the
5 information about closing the Air Mail Center has injured me and the public's right to be
6 informed and interest protected." (Dkt. #1, pg. 36).

7 The Supreme Court has established the minimum constitutional requirements for
8 standing as: (1) the plaintiff must have suffered an injury in fact-an invasion of a legally
9 protected interest which is (a) concrete and particularized and (b) actual or imminent, not
10 conjectural or hypothetical; (2) there must be a causal connection between the injury and
11 the conduct complained of-the injury has to be fairly traceable to the challenged action of
12 the defendant, and not the result of the independent action of some third party not before
13 the court; and (3) it must be likely, as opposed to speculative, that the injury will be
14 redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61
15 (1992). The party invoking federal jurisdiction bears the burden of establishing standing.
16 Id. at 561.

17 The Ninth Circuit has repeatedly held that federal plaintiffs must allege some
18 threatened or actual injury resulting from the putatively illegal action, before a federal
19 court may assume jurisdiction. See Owen v. Mulligan, 640 F.2d, 1130, 1132 (9th Cir.
20 1981); U.S. v. City of Pittsburgh, California, 661 F.2d 783, 786 (9th Cir. 1981) (A
21 plaintiff must allege a distinct and palpable injury to himself to possess standing); Rivas
22 v. Rail Delivery Serv., Inc., 423 F.3d 1079, 1082 n.1 (9th Cir. 2005) (For a plaintiff to
23 bring a claim on his own behalf, he must show that he has suffered some actual or
24 threatened injury as a result of defendants' conduct and that a decision in plaintiff's favor
25 is likely to redress the injury.). Generalized concerns in seeing that certain procedures are
26 followed, does not confer standing. See Lujan, 504 U.S. at 572-78. Similarly, an interest
27 in seeing that the law is obeyed, is also too abstract to confer standing. See L. Singer &
28 Sons v. Union Pacific R. Co., 311 U.S. 295, 303 (1940).

Here, Plaintiff has failed to demonstrate any actual or threatened injury with regard to his claims that Postal Service officials did not give proper notice, hold a public meeting, perform a feasibility study, or have an approved Area Mail Processing Plan before allegedly closing the Air Mail Facility (Dkt. #1, pg. 23). This case is similar to the prior cases Plaintiff has brought in this Court, where he has sought to challenge various Postal Service activities, but has failed to show that he was directly harmed or suffered an injury as a direct result of the alleged wrongs. In McDermott v. US Postal Service, 2006 WL 2473493 *2 (W.D.Wash., Aug. 28, 2006), this Court found that “[a] generalized concern that defendant’s alleged failure to tell the truth and comply with security and procedural rules will adversely affect the health and well-being of the postal system,” does not justify a lawsuit in federal court. And in McDermott v. United States Postal Service, 2007 WL 777520 (W.D.Wash., March 12, 2007), Judge Pechman found that “[n]othing in Plaintiff’s original complaint demonstrates anything other than the most generalized harm to himself from the claimed activity.

Thus, Plaintiff has failed to identify any specific injury in fact, or harm to himself, that has occurred as a result of his claims regarding the alleged closure of the SeaTac Air Mail Center. He simply has not suffered any financial damages or other specific harms, and there is no injury to establish standing to bring these claims in federal district court.

B. Substantive Legal Framework

Even if Plaintiff could establish standing, he has failed to identify a substantive legal framework to challenge the Postal Service’s decision regarding the alleged closure of the Air Mail Center. Plaintiff asserts jurisdiction under 28 U.S.C. § 1331, and also cites 39 U.S.C. § 409(a) (Dkt. #1, pg. 2, 24, 37). While § 1331 and § 409(a) give the district courts general jurisdiction over cases involving the Postal Service, they do not purport to create a cause of action of their own force, and are not enough to confer subject matter jurisdiction. See Flamingo Indus., 540 U.S. at 744 (*citing* F.D.I.C. v. Meyer, 510 U.S. 471 (1994)). Plaintiff must cite a substantive framework of law that imposes

1 non-tort obligations against the Postal Service. Id.; see also Currier, 379 F.3d at 724;
 2 Janakes v. U.S. Postal Serv., 768 F.2d 1091, 1093 (9th Cir. 1985).

3 Plaintiff cites a plethora of statutes, regulations, acts, policies, handbooks,
 4 manuals, and other authorities; none of which create a substantive legal framework for
 5 Plaintiff to challenge decisions regarding the closure of Postal facilities. The closest
 6 Plaintiff comes is by citing 39 U.S.C. § 404(d), which establishes procedures the Postal
 7 Service must follow in closing a post office (Dkt. #1, pg. 24). But § 404(d) itself does not
 8 explicitly provide for a cause of action against the Postal Service. And Plaintiff has failed
 9 to cite any provision of law that creates a private right of action for violations of § 404(d).
 10 See Heartland Inc., v. U.S. Postal Serv., 2008 WL 1711406 * 2 (W.D.Va., April 11,
 11 2008).

12 Furthermore, § 404(d) provides administrative procedures for appealing a decision
 13 made under that section. A determination of the Postal Service to close or consolidate
 14 any post office may be appealed by any person served by such office to the Postal
 15 Regulatory Commission within 30 days after such determination is made available to
 16 persons served by such post office. See 39 U.S.C. § 409(d)(5). First, there is no evidence
 17 that a decision was in fact made under § 404(d). Second, there is no evidence that
 18 Plaintiff is a person served by served by such office so that he can appeal a closure
 19 decision. And third, there is no evidence Plaintiff exhausted his administrative appeal
 20 rights to the Postal Regulatory Commission, before seeking to file suit in this Court. See
 21 39 U.S.C. § 404(d); see also Heartland, 2008 WL 1711406 *2.

22 Finally, Plaintiff has failed to show that the PRA contains an implied right of
 23 action to challenge Postal Service decisions regarding the closing of Postal facilities
 24 under § 404(d). See Currier, 379 F.3d at 724 (*citing Cort v. Ash*, 422 U.S. 66, 78 (1975)).
 25 Thus, Plaintiff has failed to identify a substantive legal framework of federal law for this
 26 Court to assume jurisdiction over his purported challenge to the alleged closure of the Air
 27 Mail Facility, and these claims must be dismissed.
 28

1 C. Congressional Intent

2 Even if Plaintiff could point to a substantive legal framework to support Plaintiff's
3 challenge to Postal Service decisions surrounding the alleged closure of the Air Mail
4 Facility, there is congressional intent in the PRA to preclude judicial review of challenges
5 to Postal Service regulations and administrative decisions made thereto.² Plaintiff relies
6 on § 409(a) and § 1331 for jurisdiction. But both of these general jurisdiction conferring
7 statutes, as well as the waiver of sovereign immunity in § 401, can be delimited by
8 implied exceptions when it is clearly shown that it was plainly the purpose of Congress to
9 use the sue and be sued clause in a narrow sense, or when certain types of suits are
10 inconsistent with the statutory scheme. Franchise Tax, 467 U.S. at 518-19; Active Fire
11 Sprinkler Corp. v. United States Postal Serv., 811 F.2d 747, 752 (2d Cir. 1987); Janakes,
12 768 F.2d at 1093; Currier, 190 F.Supp.2d at 1225-26 (Noting that Janakes dealt with
13 general subject matter jurisdiction under § 409(a), whereas Franchise Tax dealt with the
14 waiver of sovereign immunity under the sue and be sued clause at § 401(1), but both led
15 to an inquiry into congressional intent).

16 In Currier, the Ninth Circuit noted that the Supreme Court has liberally construed
17 the sue-or-be-sued clause in the PRA, but at the same time, the PRA provides that various
18 forms of federal law, including the APA, that normally apply to government entities do
19 not apply to the Postal Service. Currier, 379 F.3d at 724. It held that “[g]iven this
20 statutory backdrop, we are satisfied that the PRA evinces Congress’s general intent to
21 withdraw judicial scrutiny of postal regulations.” Id.

22 In the underlying decision in Currier, this Court explained that the Postal Service is
23 clearly not an ordinary profit-seeking commercial enterprise, and still retains the public
24 service features of a governmental agency. Currier, 190 F.Supp.2d at 1227. The Postal
25 Service is not to be motivated solely by profit but “shall have as its basic function the

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27 ² Note that this exact argument has been fully briefed and argued and is currently pending
28 before the Honorable James L. Robart in a pending case where Plaintiff is a named Plaintiff, and
which involves a challenge to Postal Service regulations authorizing the creation of co-branded
products. See United States Postal Service Privacy Act Litigation, 08-md-1937-JLR.

obligation to provide postal services to bind the Nation together through the personal, education, literary, and business correspondence of the people.” Id. (quoting 39 U.S.C. § 101(a)). Under these principles, this Court held that there was no waiver of immunity, no substantive legal basis, and no jurisdiction for private claims based upon Postal Service regulations. Id. Any other resolution would fly in the face of congressional intent to allow the Postal Service to operate without excessive constraints. Id.

A similar analysis was undertaken in Pitney Bowes when a plaintiff sought to challenge the Postal Service’s regulations governing the Computerized Remote Meter Resetting System (“CRMRS”), which the plaintiff operated. Pitney Bowes, 27 F.Supp.2d at 20. The Court, ruling against the plaintiff, held that “[a]n examination of the applicable statutes reveals congressional intent to remove the power of judicial review over the Postal Service’s regulations.” Id. (citing Booher v. United States Postal Serv., 843 F.2d 943 (6th Cir. 1998)). The Court further held, “[o]n its face, then, the language of the statute is clear. No Federal law, including the APA, shall apply to the Postal Service’s exercise of power. The court holds that this proscription encompasses judicial review of the promulgation and substance of [Postal Service] regulations.” Id. at 21.

This Court also issued a similar decision in a previous case brought by Plaintiff. In McDermott v. United States Postal Serv., 2006 WL 2473493 (W.D.Wash., Aug. 28, 2006), Plaintiff sought to challenge a Postal Service regulation in the Administrative Support Manual authorizing a \$15 charge whenever an electromechanical access control badge is lost by an employee. Id. at *3. The Court found that despite the sue-or-be-sued clause in the PRA, Congress intended to preclude judicial review of employee-related rule-making procedures. Id. The Court noted that the Postal Service is authorized to “adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the objectives of this title.” Id. (citing 39 U.S.C. § 401(2)). It also noted that the Postal Service is specifically exempted from most federal laws dealing with “contracts, property, works, officers, employees, budgets, or funds.” Id. (citing 39 U.S.C. § 410(a)). The Court noted that Congress provided Postal employees with notice and review rights for

1 significant adverse employment actions taken for the “efficiency of the service,” but
 2 chose not to incorporate provisions of the Civil Service Reform Act (“CSRA”) that would
 3 have allowed employees to challenge lesser employment actions or significant adverse
 4 employment actions taken in response to unacceptable job performance. *Id.* (citing 5
 5 U.S.C. §§ 7501 *et seq.*, 2301 *et seq.*, and 4301 *et seq.*).

6 Thus, the Court held, “[g]iven that the PRA, based on the specific inclusions and
 7 exclusions described above, deprives employees of the right under Chapter 43 of the
 8 CSRA to appeal momentous agency action such as a reduction in grade, it seems
 9 implausible that Congress would want to allow employees to file lawsuits over procedural
 10 disputes and/or the amount the Postal Service charged to replace a lost security badge.”
 11 *Id.* The Court further held that Congress designed the PRA “to free postal management
 12 from entangling red tape and to concentrate management authority so as to provide an
 13 efficient and economical postal system.” *Id.* at *4 (citing Governors of the U.S. Postal
 14 Serv. v. U.S. Postal Rate Comm’n, 654 F.2d 108, 109 (D.C.Cir. 1981)). In light of this
 15 purpose, the very few instances in which Congress has authorized judicial review of
 16 Postal Service actions, and the inapplicability of other statutes that might have authorized
 17 judicial review, the Court found that the text and structure of the PRA reveal a
 18 congressional intent to preclude judicial review of the Postal Service’s regulations. *Id.*

19 Furthermore, several courts have held that administrative decisions made pursuant
 20 to Postal Service regulations are non-reviewable because, among other things, Congress
 21 granted the Postal Service extensive authority to carry out its functions, and also
 22 specifically exempted the Postal Service from the APA. *See e.g. Unicolor Corp. v.*
 23 United States Postal Serv., 859 F.Supp. 1437, 1444-45 (D.Wy., 1994) (no jurisdiction to
 24 challenge administrative decisions concerning creation of philatelic rarities); Morris v.
 25 Runyon, 870 F.Supp. 362, 368-69 (D.D.C., 1994) (no jurisdiction to challenge
 26 distribution of error sheets) (citing Protestants and Other Americans United for
 27 Separation of Church and State v. O’Brien, 272 F.Supp. 712, 713 (D.D.C.1967), rev’d on
 28 other grounds, Protestants and Other Americans United for Separation of Church and

1 State v. Watson, 407 F.2d 1264 (D.C.Cir.1968) (administrative discretion of the
 2 Postmaster General in selecting designs for postage stamps is nonreviewable); Tedesco v.
 3 U.S. Postal Serv., 553 F.Supp. 1387, 1388 (W.D.Penn., Jan. 17, 1983) (no jurisdiction
 4 exists to review the Postal Service's decisions in determining where to establish post
 5 offices); Shelby Resources, Inc. v. United States Postal Serv., 619 F.Supp. 1546, 1548-49
 6 (S.D.N.Y.1985) (a challenge to Postal Service delivery schedules was not judicially
 7 reviewable); Westwood Promotions, Inc. v. United States Postal Serv., 718 F.Supp. 690,
 8 692-94 (N.D.Ill.1989) (there is no judicial review of the grant or denial of postage
 9 refunds); Concept Automation, Inc. v. U.S. Postal Serv., 887 F.Supp. 6, 8 (D.D.C. 1995)
 10 (no jurisdiction to review Postal Service's decisions whether to award contracts).

11 Thus, there is congressional intent to preclude challenges to Postal Service
 12 regulations and administrative decisions thereto. Decisions regarding the closure of
 13 Postal facilities are made pursuant to Postal Service regulations, 39 U.S.C. § 404(d), and
 14 are non-reviewable, except to the extent provided in the regulation. Thus, the general
 15 jurisdiction conferring statutes of § 409a and § 1331 are preempted by the PRA, and
 16 Plaintiff's challenges to the alleged closure of the Air Mail Facility should be dismissed.

17 **V. The Court Lacks Jurisdiction Over Plaintiff's Challenge to the Alleged**
 18 **Outsourcing of Postal Jobs.**

19 Plaintiff claims that Postal Service officials "use of false, fictitious, and fraudulent
 20 means to force the early retirement of federal employees" and seeks a review of the Postal
 21 Service's personnel reduction/retirement program and the outsourcing of core postal
 22 functions to non-federal retirement fund paying contractors (Dkt. #1, pg. 36, 40).

23 **A. Standing**

24 Plaintiff lacks standing to pursue claims regarding the alleged outsourcing of
 25 Postal jobs, because he has failed to allege an injury in fact. As noted above, Plaintiff
 26 must allege a distinct and palpable injury to himself to possess standing. See City of
 27 Pittsburgh, 661 F.2d at 786. Here, Plaintiff has failed to demonstrate any actual or
 28 threatened injury with regard to his claims that Postal Service officials used "false,

fictitious, and fraudulent means to force the early retirement of federal employees” (Dkt. #1, pg. 36). Plaintiff does not allege that he was forced into early retirement. Or that the Postal Service officials’ alleged actions resulted in an injury in fact or an invasion of a legally protected interest. Thus, because Plaintiff has failed to identify any specific injury in fact, or harm to himself, that has occurred as a result of his claims regarding the alleged forcing of early retirement of other employees, he lacks standing to bring these claims.

B. Substantive Legal Framework

Plaintiff has failed to identify a substantive legal framework to challenge the Postal Service’s decisions regarding the alleged outsourcing of Postal jobs. Plaintiff cites 29 U.S.C. § 1132(e), and argues that the ERISA provides jurisdiction to review actions that affect a federal retirement fund (Dkt. #1, pg. 2). Plaintiff is wrong. ERISA does not apply to an employee benefit plan if such plan is a governmental plan. See 29 U.S.C. § 1003(b)(1); Silvera v. Mutual Life Ins. Co. of N.Y., 884 F.2d 423, 425 (9th Cir. 1989). ERISA defines “governmental plan” as “a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.” 29 U.S.C. § 1002(32).

The USPS has two retirement programs - Civil Service Retirement System (“CSRS”) and the Federal Employees Retirement System (“FERS”). See 39 U.S.C. § 1005(d)(1). The ERISA does not apply to these federal retirement programs. See Seeger v. Office of Personnel Management, 243 F.3d 565 (C.A.Fed., 2000). And Plaintiff has failed to establish that he is the beneficiary of an ERISA-covered plan that does not fall under the governmental plan exception. As such, ERISA cannot provide the substantive legal framework for his challenge to the alleged outsourcing of Postal jobs. And Plaintiff has failed to identify any other substantive legal framework to support these claims.

C. Comprehensive Labor Relations Scheme

Even if Plaintiff could identify a substantive legal framework to challenge the alleged outsourcing of Postal jobs, the labor-relations scheme in the PRA prohibits Postal

1 Service employees from bringing employment-related claims in federal court.³ While the
 2 PRA gave district courts broad jurisdiction over Postal Service matters, Congress did not
 3 give them exclusive jurisdiction over its disputes. Lemay v. U.S. Postal Serv., 540 F.3d
 4 797, 799 (8th Cir. 2006). The jurisdiction seemingly conferred by § 401 and § 409 of the
 5 PRA, may be preempted when another, precisely drawn, detailed statute places
 6 jurisdiction elsewhere. Id. The PRA itself sets forth “a comprehensive scheme governing
 7 employment relations within the Postal Service.” 39 U.S.C. §§ 1001-11, 1202-09; see
 8 also Kennedy v. U.S. Postal Serv., 145 F.3d 1077, 1078 (9th Cir. 1998).

9 The PRA establishes a specific procedure to address Postal employee grievances
 10 regarding matters affecting their conditions of employment through their Collective
 11 Bargaining Agreements (“CBA”). The PRA does not adopt Chapter 71 of the Civil
 12 Service Reform Act, which pertains to other federal employees’ grievances. See 39
 13 U.S.C. § 410(a); Horner v. Schuck, 843 F.2d 1368, 1371 (Fed. Cir. 1988); Burke v. U.S.
 14 Postal Serv., 888 F.2d 833, 834 (Fed.Cir. 1989). Instead, the PRA limits Postal
 15 employees to the grievance procedure in the CBAs negotiated pursuant to the PRA. See
 16 39 U.S.C. §§ 1206 and 1209.

17 Apart from the grievance procedure in the CBAs, the PRA expressly authorizes
 18 federal subject matter jurisdiction for lawsuits against the Postal Service in only three
 19 instances. See 39 U.S.C. § 1208 (a), (b), and (c).⁴ Plaintiff’s claims do not fall under any
 20 of the three express provisions in the PRA authorizing suit by employees against the
 21 Postal Service. And Plaintiff has failed to demonstrate that there is an implied private
 22 right of action in the PRA. See Currier, 379 F.3d at 725 (citing Cort v. Ash, 422 U.S. 66,
 23 78 (1975)). Indeed, courts have held that there is no private right of action in the PRA for
 24

25 ³ Note that this exact argument has been fully briefed and argued and is currently pending
 26 before the Honorable James L. Robart in a pending case where Plaintiff is a named Plaintiff and
 27 is attempting to challenge employment-related claims. See United States Postal Service Privacy
Act Litigation, 08-md-1937-JLR.

28 ⁴ The PRA also provides that the Postal Service is subject to several other laws, which
 may create an independent basis for federal subject matter jurisdiction, including the Privacy
 Act, 5 U.S.C. 522a. See 39 U.S.C. § 410(b).

1 federal review of non-adverse personnel decisions. See Harper v. Frank, 985 F.2d 285,
2 289 (6th Cir. 1993) (citing United States v. Fausto, 484 U.S. 439, 443 (1988)).

3 Plaintiff has attempted to assert employment-related claims in this Court before.
4 In McDermott v. United States Postal Service, 2007 WL 777520 (W.D.Wa., March 12,
5 2007), he alleged that the Postal Service was violating its administrative regulations
6 relating to nepotism, sexual harassment, promotion procedures, and gifts. He also
7 asserted various allegations of discrimination. Id. at *1. Judge Pechman found that there
8 was no private right of action for Plaintiff's labor-related complaints. Outside of any
9 statutory exceptions, the language of the PRA operates to exclude from the broad grant of
10 federal subject matter jurisdiction the grievance claims of Postal employees, limiting them
11 instead to the remedies under their CBAs. Id. at *2 (*citing* 39 U.S.C. §§ 1206 and 1209).
12 The Court further noted that unless otherwise mandated by statute, Postal Service actions
13 are not reviewable as violations of federal law. Id. at *3 (*citing Harper*, 985 F.2d at 285;
14 Pitney Bowes, 27 F.Supp.2d at 20).

15 Here, Plaintiff's allegations pertaining to the alleged forcing of early retirement
16 and outsourcing of Postal jobs are employment-related claims. He argues that Postal
17 Service officials used false reasons to "contract the work to contractors who are not
18 paying into the Federal Retirement." He argues this caused more retired employees to
19 draw on the fund and injures the employees who are paying into the fund (Dkt. #1, pg.
20 36). These claims are based on Postal Service employees' employment relationship with
21 the Postal Service and the retirement fund available to Postal Service workers. Thus, they
22 are employment-related claims that are precluded by the employment-relations scheme in
23 the PRA.

24 **VI. Plaintiff Has Failed to State a Claim Against the Individual**
25 **Defendants.**

26 Plaintiff named two individual Postal Service employees as Defendants: Don
27 Jacobus, Seattle Processing and Distribution Manager; and Katherine Nash, Seattle
28 District Manager. These Defendants are not named in the caption of the complaint, but in

1 the section entitled “parties” (Dkt. #1, pg. 2). But Plaintiff’s claims cannot be maintained
2 against Mr. Jacobus or Ms. Nash in their individual capacities.

3 An individual may sue a federal employee for damages under Bivens v. Six
4 Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). But in order to
5 maintain a Bivens action in federal court, a plaintiff must show that a federal employee
6 violated one of the plaintiff’s established Constitutional rights. See Maraziti v. First
7 Interstate Bank, 953 F.2d 520, 523 (9th Cir. 1992). Here, Plaintiff has failed to allege any
8 constitutional violation by Defendants Jacobus or Nash.

9 To the extent Plaintiff seeks to bring his claims under the FOIA, the only proper
10 defendants in a FOIA case are executive departments, military departments, government
11 corporations, and other entities within the executive branch of the federal government.
12 See 5 U.S.C. § 552(f)(1). The FOIA does not allow a plaintiff to obtain money damages
13 from agency employees in their individual capacities. See Thompson v. Walbran, 990
14 F.2d 403, 405 (8th Cir. 1983).

15 And to the extent Plaintiff seeks to bring his claims under the FTCA, the only
16 proper federal defendant in a civil action under the FTCA is the United States of
17 America. See 28 U.S.C. § 2679(b)(1). Thus, Plaintiff has failed to identify any
18 substantive basis to bring his claims against the individual named Defendants.
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IV. CONCLUSION

WHEREFORE, for the reasons set forth above, Defendants respectfully request that the claims against them be dismissed with prejudice.

DATED this 6th day of August, 2009.

JEFFREY C. SULLIVAN
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington, and is a person of such age and discretion as to be competent to serve papers;

It is further certified that on August 6, 2009, I electronically filed the Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1) and Rule 12(b)(6) and the [Proposed] Order Granting Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1) and Rule 12(b)(6) with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following CM/ECF participant(s):

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I further certify that on August 6, 2009, I mailed by United States Postal Service the Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1) and Rule 12(b)(6) and the [Proposed] Order Granting Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1) and Rule 12(b)(6) to the following non-CM/ECF participant(s)/CM/ECF participant(s), addressed as follows:

Lance P McDermott
1819 So 104 St
Seattle, WA 98168

DATED this 6th day of August, 2009.

s/ Dung Phan
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